Supreme Court, U. S.
FILED
APR 27 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 78-1637

JOSEPH F. SHANAHAN, Petitioner

v.

BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF PENSIONS, Respondents
ROBERT E. GLADDEN

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

JOSEPH F. SHANAHAN
RD2 Alexauken Creek Road
Lambertville, New Jersey
201-788-1921, 08530
Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

Joseph F. Shanahan, Petitioner

v.

Board of Trustees of the Public Employees' Retirement System, State of New Jersey, Department of Treasury, Division of Pensions, Respondents

ROBERT F. GLADDEN

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

Joseph F. Shanahan petitions for a writ of certiorari to review the order of the Superior Court of New Jersey, Appellate Division entered in the above entitled

case on September 21,1978.

OPINIONS BELOW

The order of the Suprme Court of New Jersey dated January 30,1979 denying petitioner's motion for leave to appeal appears in the Appendix hereto at Appendix A.

The order of the Superior Court of New Jersey, Appellate Division dated September 21,1978 denying petitioner's motion for leave to intervene for injunctive reliefand to fix date for filing of intervenor's brief appears in the Appendix hereto at Appendix B.

The order of the Superior Court of New Jersey, Appellate Division dated August 23,1978 denying motion to intervene on behalf of respondent Board of Trustees of the Public Employees' Retirement System;for consolidation and for other relief and granting leave to the individual members of the Board of Trustees to intervene as respondents should they wish to do so at their own expense with respect to their individual interests appears in the Appendix hereto at Appendix C.

The order of the Superior Court of New Jersey, Appellate Division,dated August 23,1978 denying motion for leave to intervene on behalf of respondent Board of Trustees of the PERS and granting leave to the Attorney General to appear as amicus curiae, to file a brief and to present oral

argument appears in the Appendix hereto at Appendix D.

JURISDICTION

The order of the Supreme Court of New Jersey denying petitioner's motion for leave to appeal was entered on January 30,1979 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Does the order of the Superior Court, Appellate Division, dated September 21,1978 peremptorily denying petitioner-taxpayer's motion to intervene as of right under New Jersey Court Rule 4:33-1, while granting other persons leave to do so, violate the Equal Protection Clause of the Fourteenth Amendment in that by so doing it denied uniformity of treatment among persons moving to intervene in the same matter?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

New Jersey Court Rules:

" 4:33-1 Intervention as of Right
Upon Timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or

transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede pede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

N.J. Constitution Article VI, SectionII, par.3 states:

"The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

U.S. Constitution Article XIV, sectionl:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;nor shall any State deprive any person of life,liberty or property,without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The following named parties have been served with notice of this petition; Robert E. Gladden, plaintiff in original action, the Attorney General of New Jersey as amicus curiae, The Board of Trustees, Public Employees' Retirement System, intervening respondents and Fox & Fox Esqs., attorney for intervening respondents.

The basis of the controversy stems from the attempt of Robert E. Gladden,an aide to the State legislature to enroll in the State Public Employees' Retirement System. At the October 19,1977 meeting of the Board of Trustees it was determined that he was not eligible for enrollment in the system despite an Attorney General memorandum opinion of May 9,1977 to the contrary. On March 8,1978 a notice of appeal to the Superior Court,Appellate Division was filed by Mr. Gladden. On July 21,1978 a motion for leave to intervene and become an appellant in the case was filed by the Attorney General. On August 10, 1978 a motion to intervene and otherwise appear on behalf of respondent Board of Trustees,PERS was filed by Fox & Fox, Esqs., attorney for respondents. On August 23,1978 the above motion of the Attorney General was denied with leave to appeal as amicus curiae, to file a brief and to present argument. On the same day the motion to intervene on behalf of respondents was denied, with leave granted to the "individual members of the Board of Trustees to intervene as respondents should they wish to do so at their own expense with respect to their individual interests." On September 1,1978 petitioner Joseph F. Shanahan moved to intervene as of right as a citizen and taxpayer of the state pursuant to N.J. Court Rule 4:33-1. On September 21,1978 the Appellate Division denied petitioner's motion to intervene noting that, "...pursuant to leave previously granted,eight members of the Board of Trustees have intervened as parties respondent represented by the law firm of Fox and Fox." On October 6,1978 petitioner filed for certification in the Supreme Court of New Jersey which was denied on January 30,1979. (Exhs. A,B,C,D)

REASONS FOR GRANTING THE WRIT

The decision of the state court below has decided a federal question of substance in a way probably not in accord with applicable decisions of this court. It is a substantive controversy having to do with questions of public importance such as the statutory duty of the Attorney Generálto represent a state board and the possible expenditure of substantial amounts of public funds in the form of pension benefits.

Petitioner is a citizen and taxpayer of the State of New Jersey and is a proposed intervenor in the matter that he qualifies as such under Rule 4:33-1.(p.3) He has the interest in the matter as a taxpayer since the action involves the possible improper expenditures of substantial amounts of state funds which, inthe event of an adverse judgment to the Board of Trustees,

PERS, would inure to the benefit of appellant Gladden and others similarly situated to the financial detriment of petitioner and other members of the taxpaying public. Due to the exraordinary circumstances of the case, it is clear that the interest of such proposed intervenor is not being adequately represented by the existing parties and therefore he should have an opportunity to participate in order to protect that interest. The facts are that the Attorney General (statutory counsel to the Board) has attempted to intervene on the opposite side as appellant in the case, which was denied but "amicus curiae" status has been granted. (exh D) The Board of Trustees having been abandoned by the Attorney General has attempted to intervene as respondent with private counsel which was also denied, but with leave granted to the individual members to intervene as respondents at their own expense. (Exh C)

From the above it is clear that the motion of the Board to intervene has been denied but for what purpose would the individual members of the Board become parties respondent in a suit for enrollment in a pension plan at their own expense. The facts are not clear that they have accepted such responsibility.

But it is clear that they have been granted leave to intervene as individuals at their own expense while petitioner has been denied that same status. The supplemental note to that denial stating that eight members of the Board have intervened

as parties respondent does not guarantee that petitioner's interest will be adequately represented by such intervention. The individual members of the Board are respondents in the matter because of the accidence of the situation together with their natural inclination to defend Board policy and not primarily motivated as a citizen and taxpayer as is the petitioner. His interest is cost motivated; in seeing that the Board of Trustees is represented by its proper counsel, the Attorney General and that the legal fees for representing the individual members are not finally charged to the State, neither of which can be ascribed to the intervening board members simply on the basis of such intervention.

It is further clear that the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment. In Ex parte Virginia, 100 U.S. 339,347 (1880) the Court observed,

> " A State acts by its legislative,its executive, or its judicial authorities. It can act in no other way..."

Therefore the petitioner contends that the order of the Superior Court, Appellate Division dated 21 September 1978 denying petitioner's motion to intervene as of right, pursuant to R.4:33-1 violates the Equal Protection clause of the Fourteenth Amendment in that it denies

uniformity of treatment among persons moving to intervene in the same matter.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph F. Shanahan
Attorney for Petitioner

Dated 16 April 1979

APPENDIX A

SUPREME COURT OF NEW JERSEY

M-679 SEPTEMBER TERM 1978

ROBERT E. GLADDEN Appellant	:	
v.		
BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, STATE OF NEW JERSEY, et al. Respondents	:	ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion of Joseph F. Shanahan for leave to appeal is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 30th day of January, 1979.

Stephen W. Townsend
Clerk

A TRUE COPY
Stephen W. Townsend
Acting Clerk

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2554-77
MOTION NO. M-7-78
BEFORE PART A
JUDGE CRANE

ROBERT E. GLADDEN

VS

BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ETC.

MOVING PAPERS FILED SEPTEMBER 1,1978
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT SEPTEMBER 18,1978
DATE ARGUED
DATE DECIDED SEPTEMBER 21,1978

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION FOR LEAVE TO INTERVENE ON BEHALF OF JOSEPH F. SHANAHAN FOR INJUNCTIVE RELIEF, AND TO FIX DATE FOR FILING OF INTERVENOR'S BRIEF		x	x

SUPPLEMENTAL:

It is noted that pursuant to leave previously granted, eight members of the Board of Trustees have intervened as parties respondent represented by the law firm of Fox and Fox.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

For the Court

John F. Crane
P.J.A.D.

Witness, The Honorable John F. Crane, Presiding Judge of Part A, Superior Court of of New Jersey, Appellate Division, this 21st day of September 1978

Elizabeth McLaughlin
Clerk of the Appellate Division

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2554-77/A-4993
MOTION NO. M-4420-77
BEFORE PART L
JUDGES: CRANE
KOLE
ANTELL

FILED
APPELLATE DIVISION
AUG 24,1978

ROBERT E. GLADDEN
vs.
BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF PENSIONS

BOARD OF TRUSTEES
vs.
STATE OF NEW JERSEY

MOVING PAPERS FILED AUGUST 10,1978
ANSWERING PAPERS FILED AUGUST 22,1978
DATE SUBMITTED TO COURT AUGUST 16,1978
DATE ARGUED
DATE DECIDED AUGUST 23,1978

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

GRANTED	DENIED	OTHER
	xx	xx

MOTION TO INTERVENE ON BEHALF OF REPONDENT BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM; FOR CONSOLIDATION WITH

APPEAL IN A-4993-77 andFOR OTHER RELIEF

SUPPLEMENTAL: 1. See N.J.S.A. 52:17A-13; State Health Planning and Coordinating Council v. William F. Hyland ___ N.J. Super.___(App. Div. decided Aug.4,1978); Keenan v. Bd. of Chosen Freeholders of Essex County, 106 N.J. Super. 312(App. Div.1969).

2. Leave is granted to the individual members of the Board of Trustees to intervene as respondents should they wish to do so at their own expense with respect to their individual interests.

I hereby certify that the foregoing is a true copy of the original on file in my office.
W. Lewis Bambrick
Clerk

For the Court
John F. Crane
P.J.A.D.

Witness, the Honorable John F. Crane, Presiding Judge of Part L, Superior Court of New Jersey, Appellate Division, this 23 day of August 1978.

Elizabeth McLaughlin
Clerk of the Appellate Division

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2554-77
MOTION NO. M-4170-77
BEFORE PART L
JUDGES: CRANE
KOLE
ANTELL

FILED
APPELLATE DIVISION
AUG.24,1978

ROBERT E. GLADDEN

vs.

BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM,STATE OF NEW JERSEY, DEPARTMENT OF TREASURY,DIVISION OF PENSIONS

MOVING PAPERS FILED JULY 21,1978
ANSWERING PAPERS FILED AUGUST 10,1978
DATE SUBMITTED TO COURT AUGUST 16,1978
DATE ARGUED
DATE DECIDED AUGUST 23,1978

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION FOR LEAVE TO INTERVENE ON BEHALF OF RESPONDENT BOARD OF TRUSTEES OF THE PERS		xx	xx

SUPPLEMENTAL:

Leave is granted to the Attorney General to appear as amicus curiae, to file a brief and to present oral argument.

I hereby certify that the foregoing is a true copy of the original on file in my office

W. Lewis Bambrick
Clerk

For the Court

John F. Crane
P.J.A.D.

Witness, the Honorable John F. Crane, Presiding Judgeof Part L, Superior Court of New Jersey, Appellate Division, this 23rd day of August 1978.

Elizabeth McLaughlin
Clerk of the Appellate Division

CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of April 1979 three copies of the Petition for Writ of Certiorari were delivered to the office of John J. Degnan, Attorney General of New Jersey State House Annex Trenton, New Jersey 08625 and three copies of the same to the office of John P. Olender, Secretary of Board of Trustees, Public Employees' Retirement System 20 West Front Street Trenton, New Jersey 08625. I further certify that on the same day three copies each of the same were mailed at the Trenton Post Office , first class mail, toRobert E. Gladden, Esq., 501 Cooper Street Camden, New Jersey 08102 and to Fox and Fox, Esqs., 570 Broad Street Newark, New Jersey 07102.

Joseph F. Shanahan

Joseph F. Shanahan
Attorney for petitioner
RD 2 Alexauken Creek Road
Lambertville, New Jersey
08530